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SUPREME COURT  
STATE OF WASHINGTON

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NO. 84148-9

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

Respondent

v.

MICHAEL TYRONE GRESHAM,

Appellant

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

1. If a portion of RCW 10.58.090 is unconstitutional, is it severable so that the remainder of the statute is valid?
2. If the trial court admitted evidence of a prior offense in error, was the error harmless?

## **II. STATEMENT OF THE CASE**

The defendant was charged with four counts of child molestation in the first degree. 1 CP 127-128. The charges arose from an allegation that the defendant had touched J.L.'s private parts on numerous occasions when she was at the defendant's home visiting his wife and children. 1 CP 129-132. At trial the court admitted evidence pursuant to RCW 10.58.090 over the defendant's objection that the defendant had previously been convicted of assault second degree with sexual motivation against A.C. 10-28-08 RP 61-68.

The defendant was convicted of three counts of child molestation first degree and one count of attempted child molestation first degree. 1 CP 69-73. The defendant appealed his conviction arguing admission of the prior offense was erroneous. Specifically he argued that RCW 10.58.090 was unconstitutional because it violated the separation of powers doctrine and the ex

post facto clauses of both the state and federal constitutions. The Court of Appeals rejected both arguments. State v. Gresham, 153 Wn. App. 659, 223 P.3d 1194 (2009).

This Court consolidated the defendant's case with State v. Scherner, No. 84150-1 and directed the parties to provide supplemental briefing addressing the question of severability as it relates to the challenged section of Chapter 10.58 and the application of the harmless error doctrine to the admission of the challenged evidence if it was erroneous.

### **III. ARGUMENT**

#### **A. IF ANY PORTION OF THE STATUTE IS FOUND UNCONSTITUTIONAL THEN IT IS SEVERABLE FROM THE REST OF THE STATUTE.**

Gresham has argued RCW 10.58.090 in general violates the separation of powers doctrine and the state and federal ex post facto clause. In connection with his ex post facto argument he also argues RCW 10.58.090(6)(e) specifically alters the standard of proof required for conviction and therefore violates the Ex Post Facto clauses of the federal constitution. Opening Brief of Appellant Gresham at 32; Supplemental Brief of Appellant Gresham at 19-20.

The State has addressed the merits of the defendant's argument in its response and supplemental response briefs. A statute violates the ex post facto provisions of both constitutions when, as applied to offenses committed before the effective date of the statute, it alters the degree of proof essential for a conviction. State v. Slider, 38 Wn. App. 689, 695, 688 P.2d 538 (1984), review denied, 103 Wn.2d 1013 (1985). The provisions of RCW 10.58.090 do not violate either the state or federal ex post facto because they only address what a jury may consider in determining whether the State has proved each element of the charged offense beyond a reasonable doubt. The statute does not prescribe what evidence a jury must have in order to return a guilty verdict.

If the Court does conclude that RCW 10.58.090(6)(e) creates a mandatory requirement of proof so that portion of the statute would violate the Ex Post Facto clause then it should be severed and the rest of the statute should be upheld.

An act of the legislature is not unconstitutional in its entirety because one or more of its provision is unconstitutional unless the invalid provision are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes. The constitutionality of the remaining portion of the statute

is subject to alternative tests, the first dependent upon whether the legislature would have passed the remaining portion of the statute without the unconstitutional portion, or alternatively, whether the elimination of the unconstitutional portion so destroys the act as to render it incapable of accomplishing the legislative purposes.

State v. Anderson, 81 Wn.2d 234, 236, 501 P.2d 184 (1972).

(citations omitted)

A severability clause assists the Court in determining whether the first test is met, but it is not necessary in order to meet the severability test. United States v. Hoffman, 154 Wn.2d 730, 748-749, 116 P.3d 999 (2005). Even without a severability clause the Court upheld RCW 4.24.010 relating to a parent's standing to bring a wrongful death action after severing a portion of that statute which the Court found violated the State's Equal Rights Amendment in Guard v. Jackson, 83 Wn. App. 325, 921 P.2d 544 (1996) affirmed, 132 Wn.2d 660, 940 P.2d 642 (1997). The Court reasoned that after eliminating the offending portion of the statute, the general purpose of the statute was still effective. Guard, 83 Wn. App. at 334. Although the issue of severability was not raised on review of the Court of Appeal decision, this Court noted that the Court of Appeals' ruling on that point did not appear to be in error. Guard, 132 Wn.2d at 667.

This Court has also relied on a statute's legislative history, including the Legislature's statement of the basis and necessity for the statute, to assess whether the Legislature would have passed a statute if it had known the challenged portions were unconstitutional. Anderson, 81 Wn.2d at 239-240. The structure of the statute is also an indication regarding the legislative intent. Washington's former vagrancy statute, RCW 9.87.010, was upheld in part because it was subdivided so that an invalid portion should be severed from other valid portions of the statute. State v. Jones, 9 Wn. App. 1, 5-6, 511 P.2d 74 (1973).

Many of the factors which the Court has relied upon to find an invalid portion of the statute severable are present in RCW 10.58.090. There is a clear legislative statement of necessity; "the legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws of 2008, Ch. 90, §1. Grammatically the statute is subdivided. None of the non-exclusive factors outlined in RCW 10.58.090(6) are dependent on one another. If the Court were to strike subsection (6)(e) the remainder of the statute would still give effect to the legislative intent to ensure juries have all evidence



necessary and otherwise admissible pursuant to ER 403 to make a fair determination of the charges.

If the Court concludes that the "necessity of the evidence beyond the testimonies already offered at trial" factor violates the ex post facto clause then the Court should sever it from the remainder of the statute. Although the trial court considered this factor when ruling on the motion to admit C.L.'s testimony, that alone should not be grounds to grant the defendant a new trial. The trial court also considered all other factors outlined by the statute, and found each of those factors weighed in favor of admissibility. 1 CP 12-14. It is not likely the court would have ruled any differently had it not considered the necessity of the evidence factor. At most the defendant should be entitled to a new hearing before the trial judge to determine whether or not the evidence would have been admitted in the absence of that factor.

**B. IF THE CHALLENGED EVIDENCE WAS ADMITTED IN ERROR THAT ERROR WAS HARMLESS.**

The trial court specifically found the evidence at issue here was not admissible pursuant to ER 404(b). 1 CP 9-11. Thus if this Court finds that any portion of RCW 10.58.090 violates either the state or federal Ex Post Facto clauses and that portion is not

severable from the remainder of the statute, then admission of the evidence would be constitutional error.

If the admission of evidence results in constitutional error, that error may be harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In addition, a constitutional error does not require reversal if it clear beyond a reasonable doubt that the jury verdict is unattributable to the error. Id.

In this case J.L. testified to at least four incidents in which the defendant touched or attempted to touch her private areas. The defendant denied he touched J.L. inappropriately. 11-4-08 RP 126-157; 11-5-08 RP 379. Thus whether a jury would have reached the same result in the absence of the error rests on the credibility of the evidence supporting the charges.

There was no evidence presented which provided any reason to disbelieve J.L.'s account of what happened. J.L. had a very close relationship with the defendant's wife. The nature of her relationship with Leslie Gresham was corroborated by J.L.'s mother and Leslie Gresham. That closeness J.L. felt toward Mrs. Gresham and her reluctance to tell what the defendant had done was

underscored by the relief J.L. felt when she learned Mrs. Gresham was not mad at her for disclosing what happened. J.L. also felt embarrassed and uncomfortable talking about what happened. 11-4-08 RP 132, 158, 164; 11-5-08 RP 239; 11-6-08 RP 421.

Under these circumstances J.L.'s conduct in not disclosing the abuse until she did is quite understandable. It does not support any theory that her report was made up. Additional facts support the conclusion that J.L. was telling the truth, and did not make up the incidents of abuse.

There was no evidence that J.L. disliked the defendant, or wanted to get back at him or Mrs. Gresham for any reason. The evidence did show that J.L. had no knowledge of any of the details associated with the defendant's prior conviction, or even knew why he had been in jail. A reasonable jury would conclude then that J.L.'s detailed account, which was consistently retold on several occasions, came from her own experience, and not from some made up story. 11-4-08 RP 162; 11-5-08 RP 254, 343-344; 11-6-08 RP 430-431.

The manner in which J.L.'s first disclosure came about supports the conclusion that she was credible. The disclosure came after J.L. and her mother had an argument. The argument

was over and J.L. and her mother were just talking about issues that concerned them. There was nothing in that conversation that suggested J.L. had any motive to say the defendant had molested her unless it was the truth. The disclosure did not get J.L. out of any punishment, her computer was still taken away, nor did it gain her any advantage. Rather J.L. was directly disadvantaged by the disclosure because even though J.L. did not choose to pursue any action her parents kept her from going to the Gresham's afterwards. J.L. had mixed feelings about that, given her close relationship with Mrs. Gresham and their children. 11-4-08 RP 159, 167-170, 207; 11-5-08 RP 250-254, 260.

There is no evidence J.L. would have ever reported the defendant's molestation to the police. It only came to the attention of the police when she was directly asked in an open ended questionnaire whether she had been molested when she was being evaluated for services. 11-4-08 RP 161; 11-5-08 RP 258.

The foregoing circumstances demonstrate that J.L. did not have any motive to lie about the defendant molesting her. The Court should be satisfied that a reasonable jury would have reached the same result in the absence of the challenged evidence.

The defendant has argued that the evidence contemplated by RCW 10.58.090 is propensity evidence that is excluded under ER 404(b). He then argues that this propensity evidence "change[s] the rules of evidence, for the purpose of conviction" which he concludes is a violation of the ex post facto clause. Opening Brief of Petitioner Gresham at 20, 32-34, Supplemental Brief of Appellant Gresham at 19. If it was error to admit the evidence of the prior assault pursuant to RCW 10.58.090 for the reason the defendant argues it was, then that error did not contribute to the verdict.

The jury was specifically instructed that evidence of the prior offense on its own was not sufficient to prove the defendant was guilty of the crimes charged in this case. The jury was admonished that the State bore the burden of proof on each element, and that the defendant was not on trial for any other act, conduct, or offense that was not charged in the Information. 1 CP 84. This limiting instruction prevented the jury from using the evidence as propensity evidence. The jury is presumed to follow the court's instructions. State v. Willis, 67 Wn.2d 681, 686, 409 P.2d 669 (1966). Thus the jury is presumed to not have used the evidence for the purpose which the defendant argues makes its use an ex post facto

violation. Under these circumstances if the Court should find introduction of the evidence was an ex post facto violation, the Court should also find that it did not contribute to the verdict, and was therefore harmless.

#### **IV. CONCLUSION**

For the forgoing reasons the State asks the Court to affirm the Court of Appeals decision upholding the defendant's conviction.

Respectfully submitted on March 3, 2011.

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